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BEFORE THE BOARD OF PATENT APPEALS
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Appellant(s): RICHARD T. RIGG ET AL.

Mailed
SEP 8 1995
Group 1200

MILTON L. HONIG
For Appellant

EXAMINER'S ANSWER

This is in response to appellant's brief on appeal filed 05/15/95.

(1) *Status of claims.*

The statement of the status of claims contained in the brief is correct.

(2) *Status of Amendments After Final.*

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(3) *Summary of invention.*

The summary of invention contained in the brief is correct.

(4) *Issues.*

The appellant's statement of the issues in the brief is correct.

(5) *Grouping of claims.*

The rejection of claims 12-17 and 19-21 stand or fall together because appellant's brief does not include a statement that this grouping of claims does not stand or fall together and reasons in support thereof. See 37 CFR 1.162(c)(5). Appellant clearly discusses the differences of the claim groupings, but fails to state that the claims do not stand or fall together.

(6) *Claims appealed.*

The copy of the appealed claims contained in the Appendix to the brief is correct.

(7) *Prior Art of record.*

The following is a listing of the prior art of record relied upon in the rejection of claims under appeal.

4,871,262	KRAUSS ET AL	10-1989
5,163,010	KLEIN ET AL	10-1992
DE4110299	ERDTMANN	02-1993

(8) *New prior art.*

No new prior art has been applied in this examiner's answer.

(9) *Grounds of rejection.*

The following ground(s) of rejection are applicable to the appealed claims.

The following is a quotation of 35 U.S.C. § 103 which forms the basis for all obviousness rejections set forth in this Office action:

> A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

> Subject matter developed by another person, which qualifies as prior art only under subsection (f) or (g) of section 102 of this title, shall not preclude patentability under this section where the subject matter and the claimed invention were, at the time the invention was made, owned by the same person or subject to an obligation of assignment to the same person.

Claims 12-21 are rejected under 35 U.S.C. § 103 as being unpatentable over Klein et al., cited and supplied by applicant, in view of Krauss et al., ('262) and Erdtmann (4110299), also cited and supplied by applicant. Rationale: The primary reference of Klein et al. teaches a method and apparatus for customizing a cosmetic product at the point of sale. See col. 11, lines 17-50 and col. 9-39. The claims differ in that the concept of mixing various colors to form the facial cosmetic is not taught. The secondary reference of Krauss et al. teaches the concept of mixing colors in an apparatus for blending and dispersing a cosmetic foundation product. See col. 7, lines 14-34, of Krauss et al. ('262), for example. Erdtmann teaches producing a cosmetic product using an apparatus which measures skin characteristics directly

on the skin of the user before the components are mixed together. See claims 2 and 15, for example. Therefore, in view of the teachings of the secondary references, one having ordinary skill in the art would be motivated to modify the primary reference by using colors in lieu of hair additives. Such modification would be obvious because Klein et al. and Erdtmann et al. teach coloring agents as suitable agents for mixing in an apparatus for making consumer end use cosmetic products.

(10) *New ground of rejection.*

This Examiner's Answer does not contain any new ground of rejection.

(11) *Response to argument.*

Appellants arguments addressed to the pertinence of the references of record and the rejection of record, have been considered, but the same are not convincing. Appellants urging that the Klein et al. reference of record is not pertinent is not convincing. Klein is still considered pertinent,

because the concept of dispensing a liquid product such as, skin lotion is taught. See col. 2, lines 24-30. Further, the concept of having four different containers is taught. See col. 7, lines 59-65. Krauss et al. remains apposite, since the concept of adding cosmetic additives to a cosmetic base is taught. Appellants' urging that makeup foundations are not suggested is not convincing, since the disclosure teaches adding selected additives to cream bases. It is well known in the cosmetic art that facial foundations can be in cream bases. Contrary to appellants' urging otherwise Erdtmann remains pertinent since the concept of dispensing a facial foundation which matches an individual consumer's skin type and which can be labelled and dispensed for a specific consumer is taught.

Appellants' urging, that the references do not teach complexion matching directly on the skin of the consumer and identifying the cosmetic with an identifying mark is not convincing. See page 4, lines

8 to 16 and page 29, of Erdtmann. Accordingly, the instant invention is still believed pertinent.

For the above reasons, it is submitted that the final rejection of claims 12-17 and 19-21 should be sustained.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

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